



[3411-15-P]

DEPARTMENT OF AGRICULTURE

Forest Service

RIN: 0596-AD25

Stewardship End Result Contracting Projects

36 CFR Part 223

AGENCY: Forest Service, USDA.

ACTION: Final rule.

SUMMARY: The United States Department of Agriculture (Department) is issuing this rule to carry out Stewardship End Result Contracting Projects. This authority originated on a limited pilot basis and then was expanded through a succession of subsequent amendments and continued into Fiscal Year 2014. The enactment of section 8205 of the Agricultural Act of 2014 (2014 Act) establishes permanent authority to conduct Stewardship End Result Contracting projects by adding a new section 604 to the Healthy Forests Restoration Act of 2003 (HFRA). Accordingly, this final rule sets forth the regulations implementing this permanent authority. These regulations generally follow the Forest Service policy and processes that have been in place for some time. The regulations revise existing Forest Service policy to provide greater uniformity in the administration of the various mechanisms used by the Forest Service to implement stewardship projects.

DATES: This rule is effective [insert date of publication in the **FEDERAL REGISTER**].

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SUPPLEMENTAL INFORMATION:

1. Background

Beginning in 1998 with the enactment of section 347 of the Omnibus Consolidated Appropriations Act, 1999 (Pub. L. 105-277), the Forest Service has been authorized to enter into stewardship projects since 1999 (16 U.S.C. 2104 note); however, this authority was not permanent. The 2014 Act makes the authority permanent through an amendment to HFRA. With limited exceptions, the permanent authority is identical to the temporary authority. Section 604(b) of HFRA provides that the Forest Service, “via agreement or contract as appropriate, may enter into stewardship contracting projects with private persons or other public or private entities to perform services to achieve land management goals for the national forests and the public lands that meet local and rural community needs.” Section 604(d)(1) provides that a source for performance of a stewardship agreement or contract must be selected on a best value basis. Section 604(d)(4) further provides that the Forest Service can apply the value of timber or other forest products removed under the project as an offset against the value of the services received by the Forest Service. In accordance with section 604(e), the Forest Service can collect funds received under a stewardship project if doing so is a secondary objective of the project. Pursuant to section 604 of HFRA, the land management goals of a stewardship project may include any of the following:

1. Road and trail maintenance or obliteration to restore or maintain water quality;

2. Soil productivity, habitat for wildlife and fisheries, or other resource values;
3. Setting of prescribed fires to improve the composition, structure, condition, and health of stands or to improve wildlife habitat;
4. Removing vegetation or other activities to promote healthy forest stands, reduce fire hazards, or achieve other land management objectives;
5. Watershed restoration and maintenance;
6. Restoration and maintenance of wildlife and fish; and
7. Control of noxious and exotic weeds and reestablishing native plant species.

The Forest Service has utilized several types of contracts to implement the stewardship end result contracting authority. Generally, a contract that resulted in the Forest Service's receipt of service work in an amount greater than the value of the timber or forest product removed by a contractor utilized a contract that resembled a procurement of service contract. A contract that resulted in the Forest Service's receipt of service work in an amount less than the value of the timber or forest product removed by a contractor utilized a contract that resembled a timber sale contract.

Recognizing the unique nature of the use of timber and forest products as consideration for the services received under stewardship contracts and agreements, section 604(d)(2) provides that the Secretary may consider a stewardship contract to be a contract for the sale of property under terms prescribed by the Secretary without regard to any other provision of law.

Accordingly, section 223.301 of this rule continues the use of the different types of contracts based on the value of the products removed and services received. In order to ensure consistency

in the operation of these projects to the extent that is practicable, sections 223.303 and 223.304 provide for the use of existing regulatory provisions. Section 223.303 sets forth the rules for contracts that are principally the acquisition of a service and rely upon the Federal Acquisition Regulations (FAR) set forth in Title 48 of the Code of Federal Regulations. Section 223.304 sets forth the rules for contracts that are principally sales of property contracts and generally rely upon existing Forest Service Timber Sale regulations set forth in 36 CFR Part 223, Subparts A& B, except as provided in section 223.304(a).

The regulations in 2 CFR 200, as adopted and supplemented by the USDA in 2 CFR 400, 416 and 422 set forth the general rules that are applicable to all grants and cooperative agreements made by the Department of Agriculture. Because the Forest Service's use of agreements entered into under this part are not financial assistance for the benefit of the recipient but instead are entered into for the benefit of the Forest Service, the assistance regulations in 2 CFR 200, as adopted and supplemented by the USDA in 2 CFR 400, are not applicable to such agreements.

While this final rule generally sets forth the manner in which the Forest Service has implemented stewardship projects since 1999, this final rule also sets forth with greater clarity the process for selecting the appropriate mechanism to implement a stewardship end result project. Section 604(d) of HFRA requires that a source for performance of a stewardship agreement or contract be selected on a best-value basis. A stewardship agreement or contract may also be entered into notwithstanding subsections (d) and (g) of section 14 of the National Forest Management Act of 1976 (16 U.S.C. 472a). The timber included in all stewardship contracts and agreements is appraised according to standard Forest Service appraisal methods, as described in Forest Service Manual 2420.

With the enactment of section 8205 of the 2014 Act, and the corresponding HFRA amendments, the Forest Service's authority to enter into Stewardship End Result Contracting Projects is now permanently authorized. Since the primary purpose of this rule is to set forth contracting procedures that were used to implement the prior statutory provisions that were not of a permanent nature, it has been determined that this rule should become effective upon publication.

2. Regulatory Certifications

Environmental Impact

This final rule would revise Part 223 to set forth the regulations used in the conduct of Stewardship End Result Contracting Projects. The Forest Service has determined that this final rule falls within this category of actions and that no extraordinary circumstances exist which would require preparation of an environmental assessment or environmental impact statement.

Notice and Comment/Delayed Effective Date

We are issuing this final rule without prior notice and opportunity for comment. The Administrative Procedures Act (APA) exempts rules "relating to agency management or personnel or to public property, loans, grants, benefits, or contracts" from the statutory requirement for prior notice and opportunity for comment, as well as the statutory requirement for 30 days to pass before the action can be effective.

Regulatory Impact

This final rule has been reviewed under USDA procedures and Executive Order 12866 on Regulatory Planning and Review. The Office of Management and Budget (OMB) has determined that this is not a significant rule. This rule would not have an annual effect of \$100 million or more on the economy, nor would it adversely affect productivity, competition, jobs,

the environment, public health and safety, or State or local governments. This final rule would not interfere with an action taken or planned by another agency, nor raise new legal or policy issues. Finally, this final rule would not alter the budgetary impact of entitlement, grant, user fee, or loan programs or the rights and obligations of beneficiaries of such programs. Accordingly, this final rule is not subject to Office of Management and Budget (OMB) review under Executive Order (E.O.) 12866.

Regulatory Flexibility Act

The Forest Service has considered this final rule in light of the Regulatory Flexibility Act (5 U.S.C. 602 *et. seq.*) and has determined that this rule would not have a significant economic impact on a substantial number of small entities as defined by the Act. This final rule would not have any effect on small entities, as it would simply set forth existing Forest Service process for the conduct of Stewardship End Result Contracting Projects which have generally been in place for more than 10 years. This rule would not impose record-keeping requirements on small entities; it would not affect their competitive position in relation to large entities; and it would not affect their cash flow, liquidity, or ability to remain in the market.

No Takings Implications

The Forest Service has analyzed this final rule in accordance with the principles and criteria contained in E.O. 12630 and determined that the rule would not pose the risk of taking private property.

Civil Justice Reform Act

The Forest Service has reviewed this final rule under E.O. 12988, Civil Justice Reform. Under this rule, (1) all State and local laws and regulations that conflict with this rule or that impede its full implementation would be preempted; (2) no retroactive effect would be given to

this final rule; and (3) it would require administrative proceedings before parties may file suit in court challenging its provisions.

Federalism and Consultation and Coordination with Indian Tribal Governments

The Forest Service has considered this final rule under the requirements of E.O. 13132 on federalism and has determined that this rule conforms with the federalism principles in the E.O.; would not impose any compliance costs on the States; and would not have any substantial direct effects on the States, the relationship between the Federal Government and the States, or the distribution of power and responsibilities among the various levels of government. Moreover, this final rule does not have tribal implications as defined by E.O. 13175, Consultation and Coordination with Indian Tribal Governments, and therefore advance consultation with tribes is not required.

Energy Effects

The Forest Service has reviewed this final rule under E.O. 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use”, and has determined that this rule would not constitute a significant energy action as defined in the E.O.

Unfunded Mandates Reform

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538), the Forest Service has assessed the effects of this final rule on State, local, and tribal governments and the private sector. This rule would not compel the expenditure of \$100 million or more by any State, local, or tribal government or anyone in the private sector. Therefore, a statement under section 202 of the Act is not required.

Controlling Paperwork Burdens on the Public

This final rule does not contain any record-keeping or reporting requirements or other information collection requirements as defined in 5 CFR 1320 that are not already required by law or not already approved for use. Accordingly, the review provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et. seq.*) and its implementing regulations at 5 CFR 1320 do not apply.

List of Subjects in 36 CFR 223

Administrative practice and procedure, Exports, Forests and forest products, Government contracts, National forests, Reporting and recordkeeping requirements

Therefore, for the reasons stated in the preamble, the Forest Service amends 36 CFR part 223 as follows:

PART 223—SALE AND DISPOSAL OF NATIONAL FOREST SYSTEM TIMBER, SPECIAL FOREST PRODUCTS, AND FOREST BOTANTICAL PRODUCTS

1. The authority citation for part 223 is revised to read as follows:

AUTHORITY: 16 U.S.C. 618, 620-620j, 472a, and 6591c.

2. Subpart I is added to read as follows:

Subpart I - Stewardship End Result Contracting Projects

Sec.

223.300 Applicability.

223.301 Determination of type of contract or agreement.

223.302 Award of contracts and agreements.

223.303 Procurement of service contracts.

223.304 Sale of property contracts.

223.305 Agreements.

§ 223.300 Applicability.

(a) This part sets forth the regulations applicable to the implementation of section 604 of the Healthy Forest Restoration Act of 2003, “Stewardship End Result Contracting Projects” 16 U.S.C. 6591c. This section provides for the use of contracts and agreements to achieve land management goals for the national forests and the public lands that meet local and rural community needs. In the fulfillment of these activities, the Forest Service may apply the value of timber or other forest products removed from the project site as an offset against the cost of services received under such contracts or agreements.

(b)(1) *Procurement of service contracts.* If the Forest Service makes a determination as provided under section 223.301(b)(1) of this subpart that a stewardship contract is a contract for the procurement of services, the Forest Service will utilize the contracting procedures set forth in the Federal Acquisition Regulations, Title 48 of the Code of Federal Regulations including the regulations issued by the Department of Agriculture set forth in Chapter 4 of Title 48 as well as requirements included in § 223.303.

(2) *Sale of property contracts.* If the Forest Service makes a determination under § 223.301(b)(2) of this subpart that a stewardship contract is to be a contract for the sale of property, the regulations set forth in subparts A and B of this part are generally applicable, except as provided in § 223.304.

(3) *Agreements.* Agreements entered into under this subpart are not subject to grant regulations found in 2 CFR part 200 as adopted and supplemented by the USDA in 2 CFR parts 400, 416, and 422.

(4) *Other provisions.* Additional terms and conditions for contracts and agreements may be added to a contract or agreement entered into under this subpart, in accordance with applicable law and to the extent determined to be necessary by the Forest Service.

(c) *Parties to contracts and agreements.* The Forest Service may enter into contracts and agreements under this part with private persons, private entities and public entities.

§ 223.301 Determination of type of contract or agreement.

(a) *Use of a contract or agreement.* When the Forest Service initiates a project under this subpart, a determination will be made whether to use a contract or an agreement to implement the project.

(b) *Type of contract.* If the Forest Service determines that a contract will be utilized:

(1) *Procurement of service contracts.* When the value of timber or other forest products removed through the contract will be less than the total value of the service work items received by the Forest Service, the activity shall be considered a procurement of a service and a contract, for a period not to exceed 10 years, will be utilized as provided in § 223.303 or

(2) *Sale of property contracts.* When the value of timber or other forest products removed through the contract is equal to or exceeds the total value of the service work items received by the Forest Service, the activity shall be considered a sale of property and a contract, for a period not to exceed 10 years, will be utilized as provided in § 223.304.

(c) *Best interest of the government determination.* The Forest Service official who makes a determination under paragraph (b) of this section shall document in the contract file the basis for the determination that:

(1) It is in the best interest of the government that a sale of property contract is more suitable for a contract that would otherwise be subject to paragraph (b)(1) of this section; or

(2) It is in the best interest of the government that a procurement of service contract is more suitable for a contract that would otherwise be subject to paragraph (b)(2) of this section.

§ 223.302 Award of contracts and agreements.

Section 604(d) of HFRA requires that a source for performance of a stewardship agreement or contract be selected on a best-value basis. A stewardship agreement or contract may also be entered into notwithstanding subsections (d) and (g) of section 14 of the National Forest Management Act of 1976 (16 U.S.C.472a).

§ 223.303 Procurement of service contracts.

All contracts determined under § 223.301(b)(1) to be a contract for receipt of a service shall:

(a) Be administered under the Federal Acquisition Regulations, Title 48 of the Code of Federal Regulations including the regulations issued by the Department of Agriculture set forth in Chapter 4 of Title 48; and

(b) Provide for a fire liability provision. All contracts under this section shall contain a fire liability provision that is in substantially the same form as the fire liability provision

contained in integrated resource timber contracts, as described in Forest Service contract numbered 2400-13, part H, section 4.

(c) Utilize the following provisions of subparts A and B of this part:

- (1) Section 223.1 Authority to sell timber.
- (2) Section 223.3 Sale of seized material.
- (3) Section 223.14 Where timber may be cut.
- (4) Section 223.30 Consistency with plans, environmental standards, and other management requirements.
- (5) Section 223.34 Advance payment.
- (6) Section 223.36 Volume determination.
- (7) Section 223.37 Revegetation of temporary roads.
- (8) Section 223.38 Standards for road design and construction.
- (9) Section 223.40 Cancellation for environmental protection or inconsistency with plans.
- (10) Section 223.48 Restrictions on export and substitution of unprocessed timber.
- (11) Section 223.60 Determining fair market value.
- (12) Section 223.61 Establishing minimum stumpage rates.
- (13) Section 223.87 Requirements of bidders concerning exports.

(14) Section 223.113 Modification of contracts to prevent environmental damage or to conform to forest plans.

(d) Products may be valued on a per acre basis.

(e) Such other provisions as are necessary to carry out the provisions of section 604 of the Healthy Forest Restoration Act of 2003 (16 U.S.C. 6591c).

§ 223.304 Sale of property contracts.

All contracts determined under § 223.301(b) to be a contract for a sale of property shall:

(a) Utilize the provisions of subparts A and B of this part, except that the following provisions will not be applicable:

(1) Section 223.4 Exchange of trees or portions of trees.

(2) Section 223.31 Duration of contracts.

(3) Section 223.42 Transfer of effective purchaser credits.

(4) Section 223.43 Limit on amounts of transferred purchaser credits.

(5) Section 223.44 Collection rights on contracts involved in transfer of purchaser credit.

(6) Section 223.44 Collection rights on contracts involved in transfer of purchaser credit.

(7) Section 223.45 Definitions applicable to transfer of purchaser credit.

(8) Section 223.49 Downpayments. Paragraph (d).

(9) Section 223.62 Timber purchaser road construction credit.

(10) Section 223.65 Appraisal of timber for land exchange; right-of-way, or other authorized use.

(11) Section 223.80 When advertisement is required.

(12) Section 223.82 Contents of advertisement.

(13) Section 223.83 Contents of prospectus.

(14) Section 223.84 Small business bid form provisions on sales with specified road construction.

(15) Section 223.88 Bidding methods.

(16) Section 223.100 Award to highest bidder.

(17) Section 223.102 Procedure when sale is not awarded to highest bidder.

(18) Section 223.103 Award of small business set aside sales.

(19) Section 223.118 Appeal process for small business timber sale set-aside program share recomputation decisions.

(b) Include the following additional provisions:

(1) If determined by the Forest Service to be necessary to protect the interests of the United States, a performance and payment bond, as described on February 7, 2014, in section 28-103-2 and 28-103-3 of Part 48 of the Code of Federal Regulations, in an amount sufficient to protect the investment in receipts by the United States generated by the contractor from the estimated value of the forest products to be removed under the contract;

(2) Provide for a fire liability provision.

(3) Redetermination of stumpage rates and deposits: The cost of service work included in stewardship contracts will be evaluated along with stumpage values at the time of a rate determination in accordance with normal rate determination procedures.

(4) Products may be valued on a per acre basis.

(5) Such other provisions as are necessary to carry out the provisions of section 604 of the Healthy Forest Restoration Act of 2003 (16 U.S.C. 6591c).

§ 223.305 Agreements.

The Forest Service may enter into an agreement under this subpart in lieu of a contract.

(a) The regulations governing Federal financial assistance relationships are not applicable to such agreements.

(b) All agreements under this section shall contain a fire liability provision that is in substantially the same form as the fire liability provision contained in integrated resource timber contracts, as described in Forest Service contract numbered 2400-13, part H, section 4.

January 14, 2016

Robert Bonnie,
Under Secretary, NRE
U.S. Department of Agriculture

Date

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